Office - Supreme Court, U.S.
FILED
NOV 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-218

In the Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD M. NIXON, PETITIONER

v.

GERALD P. CARMEN, ADMINISTRATOR OF GENERAL SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

LEONARD SCHAITMAN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether former President Nixon's constitutional right of privacy or the Presidential privilege of confidentiality is violated by regulations, issued under the Presidential Recordings and Materials Preservation Act, which provide that the public may listen to non-personal portions of White House tape recordings made by Mr. Nixon of his conduct of official government business, when Mr. Nixon and other interested parties will have an opportunity to assert, and obtain judicial review of, a claim of privilege or invasion of privacy before any particular recording is made available.

2. Whether Mr. Nixon's constitutional right of privacy is violated by regulations that permit government archivists to listen to tape recordings to determine which are personal materials that must be returned to Mr. Nixon and which are Presidential historical materials subject to public release under the Act, when Mr. Nixon has not identified any reliable alternative method of segregating the private materials.

3. Whether the district court abused its discretion in ruling on Mr. Nixon's discovery requests, in view of an agreement among the parties limiting discovery.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 4

Conclusion 12

TABLE OF AUTHORITIES

Cases:

Nixon v. *Administrator of General Services*, 408 F. Supp. 321, aff'd, 433 U.S. 425 ..... 2, 3, 5, 7, 8, 12

United States v. *Nixon*, 418 U.S. 683 6

Whalen v. *Roe*, 429 U.S. 589 8

Statutes and regulation:

Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, Title I, 88 Stat. 1695 (codified at 44 U.S.C. 2107 note) 2

Section 101(a), 88 Stat. 1695 2
Section 101(b)(1), 88 Stat. 1695 2
Section 104(a)(1), 88 Stat. 1696 2
Section 104(a)(7), 88 Stat. 1697 2

41 C.F.R. 105-63.104(b) 7

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-218

RICHARD M. NIXON, PETITIONER

v.

GERALD P. CARMEN, ADMINISTRATOR OF GENERAL SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 670 F.2d 346. The orders of the district court (Pet. App. 41a-43a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1982. A petition for rehearing was denied on March 24, 1982 (Pet. App. 40a). On June 16, 1982, the Chief Justice extended the time in which to file a petition for a writ of certiorari to and including August 6, 1982, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was President of the United States from January 1969 until his resignation in August 1974. Shortly after petitioner's resignation, Congress enacted the Presidential Recordings and Materials Preservation Act (Pub. L. No. 93-526, Title I, 88 Stat. 1695 (codified at 44 U.S.C. 2107 note)). The Act was designed to preserve from possible destruction, and to make available for public access, petitioner's Presidential documents, including tape recordings of petitioner's office conversations (Section 101(a)). See generally *Nixon* v. *Administrator of General Services,* 433 U.S. 425, 430-436 (1977).[1] The Administrator of General Services was directed to take possession of these materials, to have professional archivists screen the materials so that private and personal materials unrelated to "the abuses of governmental power popularly identified under the generic term 'Watergate'" and "not otherwise of general historical significance" could be returned to petitioner (Sections 104(a)(1), 104(a)(7)), and to promulgate regulations governing public access to the remaining materials (Section 101(b)(1)).

Petitioner immediately sued, challenging the constitutionality of the Act. In *Nixon* v. *Administrator of General Services, supra,* this Court, affirming the decision of a three-judge district court, upheld the Act on its face. The Administrator then issued regulations governing the preservation and protection of the materials and public access to them. Petitioner challenged these regulations on numerous grounds. [2]

---

[1]This Court has estimated that the Act covered 42 million pages of documents and 880 tape recordings. *Nixon* v. *Administrator of General Services, supra,* 433 U.S. at 430.

[2]Petitioner's complaint listed 11 causes of action in 21 paragraphs. C.A. App. 21-28. ("C.A. App." refers to the joint appendix filed in the court of appeals.)

After negotiations, the parties entered a settlement agreement (C.A. App. 92-182) that required the Administrator to issue revised regulations. In return, petitioner filed an amended complaint in which he dropped all but two of his claims (Pet. App. 5a-6a). First, petitioner challenged the regulations insofar as they provided that those recordings made available for public access could be listened to by members of the public; petitioner contended that public access should be deferred, or that only transcripts or summaries should be released to the public. Second, petitioner asserted that strict limitations should be imposed on the extent to which the government archivists responsible for segregating public from private materials could listen to each tape recording; specifically, petitioner contended that the private recordings "are clearly and easily identifiable as [petitioner's] personal diary by reason, *inter alia,* of the introductory words" (C.A. App. 185).

Petitioner filed a motion for summary judgment on this complaint, and the government then filed a cross-motion for summary judgment. The United States District Court for the District of Columbia granted the government's motion (Pet. App. 6a-7a). The court of appeals affirmed, in an opinion by Judge McGowan, the author of the district court opinion in *Nixon* v. *Administrator of General Services,* 408 F. Supp. 321 (D.D.C. 1976), aff'd, 433 U.S. 425 (1977). The court of appeals rejected petitioner's contentions on the two claims remaining after the settlement agreement, and rejected as well petitioner's contention that the district court erred in not allowing certain discovery.

ARGUMENT

1. Petitioner challenges (Pet. 9-14) the way in which the public will be allowed access to tape recordings. But under the Act and its implementing regulations, no materials will be made public until they are reviewed by archivists and determined not to fall into certain categories; petitioner will then have an opportunity to challenge, in court if necessary, the archivists' determination. Specifically, the archivists, in reviewing the materials, are to give priority to segregating "private or personal materials" and returning them to their owner. They then must segregate materials that do not relate to "abuses of governmental power" or are not otherwise of "general historical significance"; even materials relating to abuses of power, or having general historical significance, will not be made public if their release would constitute "a clearly unwarranted invasion of personal privacy" (Pet. App. 9a-10a & n.10).[3] At least 30 days before releasing any materials, the Administrator must both publish and send to petitioner a notice identifying the materials to be released. Petitioner or any other person claiming a constitutional or legal right that would limit public access to the materials the Administrator proposes to release may file a claim with the Administrator, and if administrative proceedings do not resolve that claim, the Act provides for expedited judicial review in the United States District Court for the District of Columbia. *Id.* at 11a-13a.

Materials that are finally made public are to be made available in the form of duplicate tape recordings to which members of the public may listen. Petitioner urges that by not "[d]eferring direct public access for a period, such as the life of the participants in the conversations, or substituting

---

[3]The one exception to this restriction is that materials "essential to an understanding of abuses of governmental power" are to be made available to the public. Pet. App. 10a n.10.

written synopses or even transcripts for the recordings themselves" (Pet. 13), the regulations violate both the constitutional privilege for Presidential communications and petitioner's personal privacy rights (Pet. 9-14).

a. Petitioner fails to explain why his ability to challenge the release of any particular recording does not adequately protect against the possibility that public listening will violate the Presidential privilege. If the release of a recording for public listening will violate the privilege, the release will be barred. Moreover, before asserting his claims in court, petitioner can attempt to persuade the Administrator and other responsible officials to delay the release of particular recordings or to release only summaries or transcripts; these officials, members of the executive branch, can be expected to be "sensitive to executive concerns" (*Nixon* v. *Administrator of General Services, supra,* 433 U.S. at 451) and to share the executive's "vital[] concern[] with * * * the privilege" (*id.* at 449).

Petitioner's claim appears to be that allowing members of the public to listen to *any* of the recordings violates the Presidential privilege because the other means of access he proposes "advance[] the Act's legitimate objectives without unduly encroaching upon the rights of the conversants" (Pet. 13). But as the court of appeals noted, it is abundantly clear that allowing members of the public to listen to the recordings is a superior way of informing them (Pet. App. 22a-23a):

> We need not draw on disputed empirical evidence to conclude that reading transcripts or synopses, no matter how conscientiously or expertly made, is less effective a form of public access than listening to the tapes themselves. To name but a few of the differences between the spoken and written word, phrases may be inaudible or indiscernible, inflections may vary the

> meaning of a particular word or phrase, and silences or pauses may form part of a conversation's content. Even Mr. Nixon's counsel, who by his own account has listened to many of the Presidential tapes, has stated that many portions of the tapes are of poor quality and are often unintelligible. * * * If a statement is inaudible or ambiguous, the ability to listen and form one's own conclusion rather than rely on another's rendition furthers the congressional goal of providing the public with full information about the Nixon Presidency.

At the same time, there is little basis for petitioner's argument that the release of materials in this form will infringe the privilege more than their release in the form of synopses or summaries. The purpose of the privilege is to encourage candid internal deliberations; "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process" (*United States* v. *Nixon*, 418 U.S. 683, 705 (1974)). As the court of appeals noted (Pet. App. 23a), it is unlikely that officials who are concerned about possible public disclosure of their recorded remarks will be moved to be more candid by the assurance that only a transcript of their remarks could ever be made public.

Petitioner also suggests that the release of the materials should be delayed "for a period, such as the life of the participants in the conversations" (Pet. 13). While it may be appropriate to delay the release of some materials, the time at which particular tapes will be released remains to be determined. As the court of appeals pointed out (Pet. App. 24a), an across-the-board delay would seriously conflict with the Act's purpose of informing the public. Many of the subjects covered by the recordings are undoubtedly of current interest, and once a recording has been determined not

to be privileged, the public interest in not waiting several decades before learning its contents is obviously substantial.

In contrast, the benefit of an across-the-board delay of the release of the tapes — that is, the extent to which such a delay will encourage greater candor among high-level officials in the future — would not be great. The only recordings released without further delay will be those that the archivists determine to release, that are not subject to a successful assertion of privilege, and that contain conversations occurring in 1974 or earlier. Especially in view of this Court's observation that "there has never been an expectation that the confidences of the Executive Office are absolute and unyielding. * * * The expectation of the confidentiality of executive communications * * * has always been limited and subject to erosion over time after an administration leaves office" (*Nixon* v. *Administrator of General Services, supra,* 433 U.S. at 450-451), the release of those materials is not likely to chill internal debate. The court of appeals was therefore justified in concluding that the costs to the Act's objectives are not outweighed by the benefits of the blanket delay petitioner proposes.

b. In *Nixon* v. *Administrator of General Services, supra,* the Court held that while petitioner has a privacy interest, protected by the Constitution, in his "personal communications," he has no personal privacy interest in "the overwhelming majority of the materials" (433 U.S. at 465), because those materials "pertain, not to [petitioner's] private communications, but to the official conduct of his Presidency" (*id.* at 459). The Administrator's regulations—which reflect this Court's definition of petitioner's

privacy rights[4] — require the segregation of the private materials, and petitioner may challenge in court any proposal to release materials he considers private. There is, accordingly, no basis for assuming that any of the materials that implicate petitioner's personal privacy rights will be released at all.

Petitioner does not assert that there is reason to believe that personal materials will be disclosed; instead, he challenges (Pet. 10-13) the conclusion — settled by *Nixon* v. *Administrator of General Services* — that his constitutional privacy interest is limited to "matters of personal life unrelated to any acts done * * * in [his] public capacity" (433 U.S. at 457, citing *Whalen* v. *Roe*, 429 U.S. 589 (1977)). Petitioner appears to be collaterally estopped from relitigating this issue of law; moreover, apart from assertions about the practices of other Presidents, petitioner suggests no reason for the Court to reexamine this holding. Petitioner concedes that his assertions about other Presidents' practices are not supported by the record (Pet. 11 n.4), and in any event the definition of petitioner's privacy rights that this Court adopted in *Nixon* v. *Administrator of General Services* was based in large part on its review of the practices of other Presidents. See 433 U.S. at 457-458. As Judge McGowan explained in his opinion for the court of appeals,[3] petitioner "could have had [a legitimate] expectation [of privacy] in some materials, such as diaries or other

---

[4]See 41 C.F.R. 105-63.104(b) ("The term 'private or personal materials' shall mean * * * materials in any physical form relating solely to a person's family or other non-governmental activities, including private political associations, and having no connection with his constitutional or statutory powers or duties as President or as a member of the President's staff.").

[3]Judge McGowan's opinion for the district court in *Nixon* v. *Administrator of General Services*, *supra*, was the foundation of this Court's discussion of the relationship between other Presidents' practices and petitioner's privacy interests. See 433 U.S. at 457-458 n.19.

communications respecting personal matters unrelated to his public duties, * * * but not in materials relating to the conduct and official duties of the Presidency * * *. Such materials are deemed nonprivate precisely because of the public's traditional interest in and eventual access to them, as well as a President's voluntary assumption of his role as public leader." Pet. App. 15a-17a.

2. Petitioner asserts (Pet. 15) that although "less intrusive" means are available, the archivists propose to undertake "word-by-word review" of the recordings in order to determine which of them are private and therefore must be returned to petitioner. In an affidavit (C.A. App. 226-228), petitioner stated that he frequently recorded a personal diary on either dictabelts or cassette tapes, and that the diary entries, unlike other dictation, typically did not begin with a statement such as " 'This is a memorandum for Bob Haldeman' "; instead, they were "addressed to no one" and "[s]ometimes * * * began with a statement of the date followed by the beginning of a recitation of events" (C.A. App. 227-228). Petitioner also stated (C.A. App. 228): "As I continued to make these diaries, I began with greater regularity to preface them with opening comments designating them as private."

In the courts below, petitioner claimed that the archivists could determine whether his recordings were private without listening beyond the point at which a "triggering phrase," indicating that a recording was part of his diary, occurred, and that the archivists' authority to review the recordings should, accordingly, be strictly circumscribed (Pet. App. 33a). The court of appeals ruled that in view of petitioner's "own account of the variations in his trigger phrases and of his failure, in general, methodically to follow any set system in keeping his diary" (*id.* at 36a), the archivists could not be so limited. The court instead endorsed the Administrator's approach (*id.* at 31a):

> The archivists essentially propose to review the dictabelts and other tapes in the detail necessary to ascertain whether the dictabelt or tape constitutes a personal diary. * * * If an introductory phrase or certain portions of a tape reveal the tape to be a diary, the archivists will not review the tape further. * * * The archivists acknowledge, however, that at times they may find it necessary to undertake a word-by-word review of dictabelts that may, as a result of the review, be identified as diaries. * * * [T]heir judgment as to the necessary scope of review will be guided by the requirement [of the regulations] to "take all reasonable steps to minimize the degree of intrusion into private or personal materials."

The court of appeals was plainly correct in concluding that petitioner's affidavit simply did not establish that there was any set of "trigger phrases" that identified petitioner's diary with reasonable certainty. Petitioner's affidavit does not assert, for example, that all his dictation except his diary was addressed to someone. Moreover, petitioner acknowledged that his practice was irregular. It follows that in some instances at least, the archivists must listen past the introductory phrase in order to determine whether a recording is part of petitioner's personal diary. As the court of appeals pointed out, however, when it can be ascertained that a tape is private without listening to the entire tape the archivists will listen no further than is necessary to make that determination.

Petitioner now appears to have abandoned his insistence on "the 'triggering phrase' method" (Pet. 15). Instead, petitioner proposes that the archivists be required to "use * * * the 'triggering method' whenever it fulfills the task, with access to such portions of the dictation as are necessary to determine its character only when the 'triggering phrase'

method is actually inadequate" (*ibid.*). This approach is indistinguishable from that specified by the Administrator and upheld by the court of appeals.

3. Finally, petitioner claims that the district court abused its discretion in not allowing him to depose the Counsel to the President and the Archivist and Deputy Assistant Archivist of the United States. Petitioner intended to question the Counsel about his and the President's views on the Administrator's regulations, and to question the Archivist and Deputy Assistant Archivist on their agreements with other Presidents about the disposition of their materials.

As the court of appeals explained (Pet. App. 37a), when petitioner filed his complaint after the settlement agreement was reached, he also proposed a schedule. The schedule provided for "a brief period for discovery of material 'reasonably necessary for of filing dispositive motions' " (Pet. App. 6a). The district court accepted the schedule, and interrogatories and requests for admissions were served upon, and answered by, the Administrator (*ibid.*). Petitioner then moved for summary judgment. Shortly *after* filing this motion, petitioner sought leave to depose the Counsel to the President. Later, after the government had filed its cross-motion for summary judgment, petitioner sought to take the depositions of the Archivist and Deputy Archivist and subpoenaed documents from them.

In these circumstances, the district court plainly did not abuse its discretion in denying discovery. Petitioner asserts (Pet. 9) that he sought to depose the Archivist and the Deputy Assistant Archivist because the government had introduced affidavits from them; but the court of appeals expressly eschewed reliance on their affidavits (Pet. App. 38a-39a). Moreover, petitioner does not explain why the supposed relevance of other Presidents' agreements with the Archivist did not become clear to him until after the

summary judgment motions had been filed. Finally, even apart from the discovery schedule, petitioner's claim that he was entitled to depose the Counsel to the President to determine his and the President's views about the regulations is obviously insubstantial; the regulations were issued by the Administrator of General Services, who is a member of the executive branch, and are defended by the Department of Justice, which is responsible for representing the executive branch in court. See *Nixon* v. *Administrator of General Services, supra,* 433 U.S. at 441, 449.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

LEONARD SCHAITMAN
Attorney

NOVEMBER 1982

---

[6]Indeed, the deliberative privileges of the executive branch, which petitioner not only recognizes but advocates, protect the content of exchanges between the President and one of his closest legal advisers in litigation against the government.